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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1215

LEONARD EAST AND ALVIN G. EAST, DOING BUSINESS AS L. EAST PRODUCE COMPANY, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the Circuit Court of Appeals (R. 190–192) is reported at 158 F. 2d 227.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 2, 1946 (R. 192), and a petition for rehearing was denied January 7, 1947 (R. 201). The petition for a writ of certiorari was filed April 7, 1947. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a seller who has invoiced a shipment at a legal price per pound but has shipped less than the invoiced poundage is liable in a damage action under Section 205 (e) of the Emergency Price Control Act, where the resulting alleged overcharge was not wilful or due to failure to take practicable precautions.

2. Whether in an action for statutory damages under the Emergency Price Control Act, the trial court's submission of the case to the jury was erroneous because (a) it was submitted for special verdict on particular issues of fact rather than for a general verdict and (b) the form in which the particular instructions presented the issue of petitioners' responsibility for the short-weight shipment was allegedly inadequate.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, Pub. Law 548, 79th Cong. 2d Sess.; 50 U. S. C. App. Supp. V., 901 *et seq.*) and Revised Maximum Price Regulation 269 (9 F. R. 15095), the pertinent provisions of which are set out in the Appendix, *infra,* pp. 13–17.

STATEMENT

Pursuant to Section 205 (e) of the Emergency Price Control Act (Appendix, *infra,* pp. 13–15), the Administrator sued petitioners for statutory damages for sales of poultry at prices in excess of maximum prices established by Revised Maximum Price Regulation 269 (R 1–5, 9–12). It was alleged that petitioners sold poultry at 45 cents a pound, a sum within the maximum price, but billed the buyer for more pounds than petitioners shipped and delivered (R 4, 11). The invoices were in the amount of $495.00 for 1,100 pounds of poultry, whereas petitioner delivered only 724 pounds, 6 ounces, which at the ceiling price of 46.68 cents per pound indicated a maximum price for the sales of $338.14, the resulting alleged overcharge being $156.86 (R. 11).

The defense was based primarily on the theory that there was no violation because there was no allegation or proof that petitioners wilfully or intentionally shortweighted the buyer, and secondarily, if there was a violation, it was not wilful or the result of failure to take practicable precautions (R. 6, 12, 13–27, 28–32, 185–186).

Evidence was presented to the effect that petitioners had made two shipments of poultry to the buyer by Brown Express, express prepaid, of 800 pounds and 300 pounds respectively (R. 58, 59, 60, 166); that the seller had invoiced the

shipments as 800 pounds fryers, and 300 pounds fryers (R. 58, 61, 71–72); that the Express Company always made out their bills of lading for the gross weight, which in addition to the poultry would include the crate, ice, etc. (R. 165, 121); that the boxes in which the poultry was shipped were not opened in transit, or their contents dissipated (R. 93, 103, 130); that the consignee had weighed the poultry actually shipped and found less poultry than had been ordered and billed (R. 77–78); that the total sum for which the shipments were billed was $495.00 (R. 58, 61); that the ceiling price was 46.68 cents per pound (R. 55); that the total weight delivered on the two shipments was 530 pounds, 10 ounces, (R. 77) and 193 pounds, 12 ounces, respectively (R. 78). The Administrator also introduced evidence showing that petitioners were under an injunction resulting from purchases of poultry at overceiling amounts (R. 154–155), and that on a previous occasion petitioners had shortweighted the same buyer by a similar percentage (R. 74–75).

Alvin G. East testified to the effect that, if petitioners' shipments were short, it was unintentional (R. 151); that they supposed the poultry would be weighed on receipt (R. 150); and that when, upon institution of the suit, they learned of the claim that the poultry was short,

they returned the check for the original invoice and sent a new invoice for the amount of poultry the consignee claimed to have received (R. 150–152).

The case was submitted to the jury on special issues (R. 168–178), as to which the jury found: (1) That the petitioners' delivery of poultry was less by a specified number of pounds than the amount ordered by and billed to the buyer (R. 43, 44, 45–46); (2) that petitioners had not wilfully or intentionally delivered less than the weight billed (R. 44, 47); and (3) that the short delivery was not the result of failure to take practicable precautions (R. 45, 48).

Petitioners' request for special issues to be submitted to the jury (R. 13–27), and for judgment on the jury's findings (R. 185–186), both based on the theory that the Administrator had to prove that the shortweighted shipments were intentionally made, were denied by the district court (R. 180, 186), which entered judgment for the Administrator for the amount of the overcharges, viz., $156.86 (R. 48–49).

In the Circuit Court of Appeals, the petitioners again urged the theory that the Act was only violated by an intentional shipment of less than the contract amount, but the court affirmed the judgment *per curiam* (R. 190–191). Petitioners reasserted their theory in a petition for rehearing (R. 193–200) which was denied (R. 201).

ARGUMENT

1. Petitioners urge that "the language of the Act patently evidences the intention of Congress to penalize a vendor solely for a voluntary and knowing sale or transfer of property for an agreed price which is in excess of the OPA maximum fixed price for the property" (Br. 16). But the language and legislative history of Section 205 (e) disclose that Congress did intend to establish a cause of action for statutory damages where a seller has unintentionally participated in an overceiling transaction. As originally drafted, Section 205 (e) made mandatory the award of treble damages whenever an overcharge occurred. *Bowles* v. *American Stores,* 139 F. 2d 377 (App. D. C.), certiorari denied, 322 U. S. 730. The section was amended in 1944 [1] to provide that where the seller established that he had not acted wilfully or with failure to take practicable precautions, the damages would be limited to the amount of the overcharges or $25.00, whichever was larger. This language, as well as the Report of the Senate Banking and Currency Committee,[2]

[1] Section 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 640); see Appendix *infra*, p. 14.

[2] In explaining the purpose of this amendment, the Senate Committee said: "* * * the court should be permitted * * * to assess something less than treble damages in cases where violations occur unintentionally and despite the exercise of due diligence to prevent them." (S. Rep. 922, 78th Cong., 2d sess., p. 14).

makes it very clear that Congress did not overlook the possibility that a seller may violate a regulation by an unintentional overcharge, but instead provided for a minimum amount of damages to be assessed under such circumstances. Congress doubtless concluded that proof of motive with which the seller acted would be an onerous burden for the Administrator which would seriously impede enforcement activities. *Porter* v. *Bledsoe,* 159 F. 2d 495, 497 (C. C. A. 4). The courts have thus generally held that the seller is liable for damages for at least the amount of the overcharges whenever the buyer has been charged more than the maximum price established by the applicable regulation, even though the violation was an unintentional one. *Porter* v. *Bledsoe, supra; Kenney* v. *Hood,* 158 F. 2d 226 (C. C. A. 5); *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, 434–35 (C. C. A. 9), certiorari denied, October 14, 1946, No. 161, Oct. T. 1946; *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597, 600 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Bowles* v. *Franceschini,* 145 F. 2d 510, 512–14 (C. C. A. 1).

The cases cited by petitioners in support of their contention that Section 205 (e) requires that the violative acts be intentionally performed (Br. 25–28) are inapposite. In the main, these cases fall into two categories, criminal suits and

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suits for injunctive relief, neither of which involve the same standards applicable to statutory damage actions.[3]

Nor is there any merit to petitioners' contention that the present transaction is not a "sale" within the language of Section 205 (e). Section 205 (e) provides that a "person selling a commodity" at a price in excess of the legal maximum shall be liable for statutory damages "on account of the overcharge." Section 302 (a) indicates that "selling" includes "contracts and offers" to sell. Hence, the seller who is liable under Section 205 (e) "on account of the overcharge" includes one who has contracted or offered to sell at a price higher than the legally

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[3] In the former category, the statute itself, Section 205 (b) requires that the violative acts be wilfully performed, in contrast to Section 205 (e) where no such requirement is made, and in the latter, this Court has stated that the trial court has discretion as to whether an injunction shall issue depending on the facts of each case. *Hecht Co.* v. *Bowles*, 321 U. S. 321. In actions under Section 205 (e), on the other hand, the only discretion vested in the court is the amount of damages to be awarded, not less than the amount of the overcharge and not more than three times that sum. *Bowles* v. *Heinel Motors, Inc.*, 59 F. Supp. 759 (E. D. Pa.), affirmed, 149 F. 2d 815 (C. C. A. 3), certiorari denied, 326 U. S. 760; *Bowles* v. *Goebel*, 151 F. 2d 671 (C. C. A. 8); *Bowles* v. *Krodel*, 149 F. 2d 398 (C. C. A. 7). Nor can petitioner find any support for his contention in *Brown* v. *Banana Distributors of Connecticut*, 52 F. Supp. 804 (D. Conn.). There, the court was dealing with the evasion provision where the motive with which a seller acts is obviously material.

authorized maximum.[4] The shortweighted shipment of poultry here involved, even in the ordinary law of sales, constituted a new offer by petitioners to sell the poultry actually shipped for the total sum billed to the buyer, which when accepted, as it was, by the latter became a binding contract. 1 Williston, *Sales* (2d ed. 1924), Sec. 279; *Porter* v. *Bledsoe,* 159 F. 2d 495, 499 (C. C. A. 4). And it is, of course, just as much an overcharge where the buyer receives less than the

[4] Accordingly, the word "overcharge" as defined in Section 205 (e) ["the amount by which the consideration exceeds the applicable maximum price"] is broad enough to include the excess above the ceiling price in a contract or offer to sell, regardless of the acceptance or nonacceptance of payment of the overceiling amount. Cf. *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. C. A. 9), certiorari denied, October 14, 1946, No. 161, Oct. T., 1946; *Duffy* v. *Howell*, 166 P. 2d 411 (Cal. Super. Ct., App. Div); *Bowles* v. *Leventhal*, 61 F. Supp. 144 (S. D. N. Y.), reversed on other grounds 160 F. 2d 52 (C. C. A. 2).

The definitions of "maximum price" in Section 302 (i) and of "price" in Section 302 (b) corroborate the above analysis and produce a complete consistency with the other definitions. Thus "maximum price" is defined as the "maximum lawful price," and "price" is defined as the "consideration demanded or received in connection with the sale of a commodity." Hence, "maximum price" means the maximum consideration which may lawfully be *demanded* or received in connection with a sale, transfer, etc., or contract of sale, transfer, etc.

Taking into account, then, all of the other definitions, the definition of "overcharge" is to be understood as follows: The amount by which the consideration exceeds the maximum consideration which may lawfully be demanded or received in connection with the sale, transfer, etc., or contract or offer of sale, transfer, etc.

quantity ordered and billed at ceiling prices (*Brown* v. *Mars,* 135 F. 2d 843, 849 (C. C. A. 8), certiorari denied, 320 U. S. 798) as it is where he receives less than the quality ordered and billed at ceiling prices. (*United States* v. *Bruno,* 329 U. S. 207; *Porter* v. *Bledsoe, supra*), or the correct quantity and quality at prices which are above ceiling.

2. (a) Petitioners contend that there should have been submitted to the jury the question of whether petitioners violated the Act and Regulation by selling or delivering poultry at prices in excess of the applicable maximum price (Br. 28–29). The question as framed by petitioners appears to be a request for a general verdict. However, none of the cases cited by petitioners (Br. 31) support the proposition that a statutory damage action under Section 205 (e) must be submitted to a jury for a general verdict. In fact, the only cited case in point,[5] *Shearer* v. *Porter,* 155 F. 2d 77 (C. C. A. 8), expressly holds that a statutory damage action under the Emergency Price Control Act can be submitted to a

[5] *Flannagan* v. *United States,* 145 F. 2d 740 (C. C. A. 9), and *United States* v. *Lutz,* 142 F. 2d 985 (C. C. A. 3), are criminal cases, obviously inapplicable to the present case. *Brown* v. *Quinlan,* 138 F. 2d 228 (C. C. A. 7) was an action for a preliminary injunction which was not tried to a jury. *Bowles* v. *Goebel,* 151 F. 2d 671 (C. C. A. 8), did not involve the issue of whether the court had to submit the case for a general verdict, but held that where the court did so submit the case it did not err; and the same Circuit Court of Appeals decided the *Shearer* case, cited in the text.

jury for special verdict (155 F. 2d at 82). See Rule 49 (a), F. R. Civ. P., *infra*, p. 16.

(b) Nor is there any merit to petitioners' contention that the issues submitted to the jury were inadequate to present the question of petitioners' responsibility for the poultry actually delivered (Pet. 32). The issues submitted included an inquiry as to whether "defendants * * * delivered less than the invoiced amount of poultry" (R. 43, 45–46). Clearly, the affirmative answer to the inquiry rules out any inference that any outside agency caused the delivery of the lesser amount. Further, the testimony presented by the Administrator (R. 93, 103, 130), unrebutted by petitioners, clearly shows that the shipment was not tampered with after it left the seller's control. Petitioners, in the trial court, never even seriously contended that the character or the quantity of the shipment changed after it left their premises and before it was delivered to the buyer; in their numerous requests for special interrogatories (R. 12–27), and in their exceptions to the court's charge (R. 28–32), there is no indication that petitioners thought the issue was presented by the evidence and should, therefore, be submitted to the jury. It is therefore clear that even if such issue of fact were raised by the evidence and had not been submitted to the jury, the petitioners waived their right to a trial by jury on the issue. Rule 49 (a), F. R. Civ. P.

CONCLUSION

The decision of the court below is correct, this is no conflict of decision, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

WILLIAM E. REMY,
Deputy Commissioner for Enforcement,

DAVID LONDON,
Director, Litigation Division,

SAMUEL MERMIN,
Solicitor, Litigation Division,

JACOB W. ROSENTHAL,
Attorney,
Office of Price Administration,
Office of Temporary Controls.

MAY 1947.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, Pub. Law 548, 79th Cong. 2d Sess., 50 U. S. C. App. Supp. V. 901 et seq) are:

SEC. 205.

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may,[1] *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge.* ***In any action under this subsection,***[2] *the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is*[3] *greater:*

---

[1] Remainder of subsec. (e) amended by sec. 108 (b) of the Stabilization Extension Act of 1944. Originally read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] As amended by sec. 12 (a) of the Price Control Extension Act of 1946. Previously read, in place of bold-faced language: "In such action."

[3] As amended by sec. 12 (a) of the Price Control Extension Act of 1946, deleting "the" at this point.

(1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges[4] *if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[5] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action*

[4] As amended by sec. 12 (a) of the Price Control Extension Act of 1946, deleting "or $25, whichever is greater," at this point.

[5] Added by sec. 108 (b) of the Stabilization Extension Act of 1944.

for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.[6] * * *

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

* * * * *

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations.

[6] As amended by sec. 108 (b) of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

2. Rule 49 (a), F. R. Civ. P., is as follows:

Rule 49. Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

3. Pertinent provisions of revised Maximum Price Regulation 269 (9 F. R. 15095) are:

SEC. 1.3. *What this regulation prohibits*—(a) *Prohibition against sales of poultry items at prices above the maximum.* Regardless of any contract, agreement or other obligation, no person shall sell or deliver or

cause to be sold or delivered, whether for his own account or otherwise, the poultry items specified in this regulation at a price higher than the maximum prices established by this regulation; and no person in the course of trade or business shall buy or receive such poultry items at a price higher than the maximum prices established by this regulation; and no person shall agree, offer, solicit or attempt to do any of the foregoing.

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